BONGSOR BINA SDN BHD

v.

MANZER MEDICAL SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDDIN YUNUS J
[CIVIL SUIT NO: 22-53-2003]
15 MARCH 2004

CIVIL PROCEDURE: *Action - Consolidation of actions - Order for consolidation of three suits - Effect of - Defendant continued to employ different solicitors for 1st and 3rd suits - Whether defendant could only appoint one solicitor for proceeding of consolidated action*

The plaintiff had applied for, and obtained, an order for the consolidation of three cases, suit S3-22-53-2003 ('the 1st suit'), suit S6-22-588-1999 ('the 2nd suit') and suit S5-22-193-2000 ('the 3rd suit'), in the present proceeding. This was an interlocutory application by the plaintiff for an order that one Manzer Medical Sdn Bhd ('Manzer') – the 1st defendant in the 1st suit and the sole defendant in the 3rd suit – appoints only one solicitor on record for the purpose of the proceeding in the present consolidated action. The plaintiff's cause of action against Manzer in the 1st suit differed from its cause of action against the same in the 3rd suit, and both before and after the consolidation, Manzer was represented by Messrs Apandi Ali & Co in the 1st suit, and Messrs Thangaraj & Assoc in the 3rd suit. The main issue requiring determination was whether it was legally improper for Manzer to continue to employ different solicitors for the 1st and 3rd suits instead of one solicitor on record after the consolidation of all three suits.

Held (dismissing the application):

[1] Although the three suits were to be treated as one cause or action after the consolidation order, the existences of the individual suits that were consolidated did not come to an end by reason of the consolidation. In other words, the consolidation order did not affect the identity or existence of the cases that had been consolidated, the status of the parties to the suits or the pleadings in the suits. (pp 310 f-h & 311 a)

[2] A party to a proceeding has a fundamental right to freely appoint a solicitor or counsel of its choice, and the plaintiff had failed to convince this court that the present case was so exceptional that a departure from that principle was warranted. (p 311 b & f-g)

[3] Even though the plaintiff's solicitors would have to serve the process twice on Manzer, it was wrong to regard such services a duplicity because the service of the process on Messrs Apandi Ali & Co was in respect of Manzer as the 1st defendant in the 1st suit, whereas the service on Messrs Thangaraj & Assoc was in respect of Manzer as the sole defendant in the 3rd suit. (pp 311 h & 312 a-b)

[4] The question of unfairness also did not arise because counsel from the respective firms would be confined to cross-examining witnesses on matters relevant to their respective suits. (p 312 c-d)

[5] In any case, since the plaintiff did not raise this issue of representation when applying for consolidation (despite being aware of the facts), there was an implied representation by the plaintiff then that the arrangement regarding the solicitors on record for Manzer was acceptable to the plaintiff. Thus, the plaintiff was now estopped from raising this issue of unfairness. (p 312 e-h)

Case(s) referred to:

Bousted Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(foll)***

Oswald Hickson Collier & Co v. Carter-Ruck [1984] 1 AC 720 ***(foll)***

Timothy D McFetridge, Excutor of the Estate of Kent George McBain Ward, Deceased & Ors v. Olds Aviation Ltd [1997] 69 ACWS (3d) 427 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 4 r. 1(2), O. 5 r. 6, O. 6 r. 4(1)(a), (2)(a), O. 12 rr. 1, 2(2), (3)(b), 4(2), O. 15 r. 5(1)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 37, p 60

For the plaintiff in all the three suits - KL Pang; M/s Cheah Teh & Su

(Civil Suit No: S3-22-53-2003)
For the 1st, 2nd & 3rd defendants - Mohd Ilias; M/s Apandi Ali & Co
For the 4th defendant - Karen Lee; M/s Lee Min Choon & Co

(Civil Suit No: S6-22-588-1999)
For the defendant - Karen Lee; M/s Lee Min Choon & Co

(Civil Suit No: S5-22-193-2000)
For the defendant - YC Lee; M/s Thangaraj & Assoc

Reported by Suresh Nathan

JUDGMENT

Hishamuddin Yunus J:

The summons in chambers at encl. 87 is the plaintiffs (Bongsor Bina Sdn Bhd) interlocutory application for an order that Manzer Medical Sdn Bhd ('Manzer'), that is, the 1st defendant in suit S3-22-53-2003 ('the 1st suit') and the (sole) defendant in suit S5-22-193-2000 ('the 3rd suit), appoints only one solicitor on record for the purpose of the proceeding in the present consolidated action.

There is also an alternative prayer by the plaintiff that the issues in the 3rd suit be tried separately from and after the conclusion of the consolidated action, citing O. 15 r. 5(1) of the Rules of the High Court 1980 ('the RHC).

Manzer presently has two solicitors on record, namely:

(a) Messrs Apandi Ali & Co, the solicitor on record for Manzer in the 1st suit; and

(b) Messrs Thangaraj & Associates, the solicitor on record for Manzer in the 3rd suit.

Manzer opposes this application.

The three cases in the present proceeding, namely:

(a) the 1st suit;

(b) the 2nd suit, namely, civil suit No. S6-22-588-1999; and

(c) the 3rd suit,

were consolidated on 19 June 2003 on the application of the plaintiff pursuant to an order of court. It was a consent order.

The plaintiff's cause of action against Manzer in the 1st suit is different from the plaintiff's cause of action against the same in the 3rd suit. In the 1st suit, the plaintiff's causes of action against Manzer are for alleged breach of contract and conspiracy to defraud the plaintiff.

In the 3rd suit, the plaintiffs cause of action against Manzer is for alleged unlawful retention of a performance bond/guarantee executed by the plaintiff in favour of Manzer.

As can be seen from the title of the present action, Manzer is not a party in the 2nd suit.

It is pertinent to note that the plaintiff, when applying for the three cases to be consolidated *vide* its summons in chambers dated 7 May 2003, was fully aware that Manzer was represented by different solicitors in the 1st suit and in the 3rd suit; and did not at any time during the hearing of the application raise any objection to Manzer to continue having different solicitors for the two suits in the event the plaintiffs application for consolidation were to be allowed. It was only subsequently, after the plaintiff had succeeded in obtaining the order for consolidation, that the issue of representation was raised.

Before the consolidation, Manzer was represented by Messrs Apandi Ali in the 1st suit, and by Messrs Thangaraj in the 3rd suit.

After the consolidation, however, Manzer continues to be represented by Messrs Apandi Ali in the 1st suit; and continues to be represented by Messrs Thangaraj in the 3rd suit.

I have dismissed the plaintiffs application with costs.

In *Halsbury's Laws of England*, 4th edn., vol. 37, a consolidation of cases is defined as follows (at p. 60):

> **69. Consolidation.** Consolidation is a process by which two or more causes or matters are by order of the court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort, and to make the conduct of several actions more convenient by treating them as one action.

Encik KL Pang, the learned counsel for the plaintiff, contends that such a situation as the present (where, on record, Manzer employs two firms of solicitors, one for each of the two suits) is legally improper. The learned counsel contends that after the consolidated order the three suits have now become one cause or matter or action, and hence Manzer can no longer employ different solicitors for the 1st and 3rd suit: it must employ only one solicitor on record.

But Encik Pang, however, is unable to point to any provision in the Legal Profession Act or in the RHC which specifically disallows Manzer from employing two different solicitors. He, however, refers to the following provisions of the RHC:

(a) Order 5 r. 6;

(b) Order 6 rr. 4(1)(a) and (2)(a); and

(c) Order 12 rr. 1, 2(2), 2(3)(b), and 4(2).

With respect, I find these provisions irrelevant. These provisions cited by counsel only deal with the appointment of a solicitor by a party in a normal situation, that is to say, in a single suit situation. The provisions, however, do not deal with the peculiar situation that is now before this court. The provisions do not deal with the appointment of solicitors in respect of a consolidated action. In the present case, we are concerned with the appointment of a solicitor by a party in two different suits that have been consolidated, namely, the 1st suit and the 3rd suit.

In my judgment, the existence of the three suits that have been consolidated cannot be ignored even after the consolidation order. It is true that after the consolidation order, the three suits are to be treated as one cause or matter or action. However, be that as it may, the existences of the individual suits that are consolidated do not come to an end or are obliterated by reason of the consolidation. In a consolidation of cases, the individual suits still exist and this fact is reflected in the title of the consolidated action. Order 4 r. 1(2) stipulates:

> (2) An order for consolidation must be in Form 1 and shall direct that the cause or matter in which the application is made shall thence forward be carried on in such other cause or matter **and that the title of such other cause or matter be amended by adding thereto the title of the cause or matter in which the application is made.** (emphasis added)

In other words, the consolidation order does not affect the identity or the existence of the cases that have been consolidated, or the status of the parties to the suits. Nor does it affects the pleadings.

Another reason why I dismissed the present application is that there is the principle that a party to a proceeding has a fundamental right to freely appoint a solicitor or counsel of its choice. This principle is practised in other jurisdictions as well. For example, in the Canadian case of *Timothy D. McFetridge, Executor of the Estate of Kent George McBain Ward, deceased and Others v. Olds Aviation Ltd.* [1997] 69 ACWS (3d) 427, the court ruled:

> The right of the subject freely to choose and instruct solicitors and counsel is fundamental.

In the English Court of Appeal case of *Oswald Hickson Collier & Co. v. Carter-Ruck* [1984] 1 AC 720, Lord Denning MR (at p. 723) said:

> It was submitted by Mr. Cullen that – as the relationship between a solicitor and his client is a fiduciary relationship – it would be contrary to public policy that he should be precluded from acting for a client when that client wanted him to act for him: especially in pending litigation. It seems to me that that submission is right ... It is contrary to public policy because there is a fiduciary relationship between them. The client ought reasonably to be entitled to the services of such solicitor as he wishes. That solicitor no doubt had a great deal of confidential information available to him. It would be contrary to public policy if the solicitor were prevented from acting for him by a clause of this kind.

The above principle must be respected and applied to the facts of the present case. Of course, needless to say that the application of this principle is subject to any written law such as the Legal Profession Act 1976 or the RHC, and a court of law must depart from this cardinal principle, if the peculiar circumstances of the case so require with a view to do justice to the parties. In the present case, however, the learned counsel for the plaintiff has failed to convince me that the present case is so exceptional that a departure from the principle is warranted.

Encik Pang further submits that if Manzer is allowed to employ both Messrs Apandi Ali and Messrs Thangaraj there will be duplicity in the service of documents or processes. He argues that the plaintiff will have to serve a process twice on Manzer's solicitor: first on Messrs Apandi Ali, and second on Messrs Thangaraj. I accept that the plaintiffs solicitor will have to serve the process twice on Manzer, that is to say, on Messrs Apandi Ali and on Messrs Thangaraj. But, with respect, I think it is wrong

to regard such services as duplicity because, as has been explained just now, although there has been a consolidation, the existences of the 1st suit and the 3rd suit are not extinguished; and that being the case, the service of the process on Messrs Apandi Ali is not the same as the service of the process on Messrs Thangaraj. The service on Messrs Apandi Ali is in respect of Manzer as the litigant (the 1st defendant) in the 1st suit, whereas the service on Messrs Thangaraj is in respect of Manzer as the litigant (the sole defendant) in the 3rd suit.

Encik Pang also submits that if there are going to be two solicitors representing Manzer there will be unfairness to the plaintiff at the trial in that Manzer's counsel will be able to cross-examine each of the plaintiffs witnesses twice: the first cross-examination will be by Manzer's counsel from Messrs Apandi Ali, and the second cross-examination will be by Manzer's counsel from Messrs Thangaraj. With respect, the question of unfairness does not arise because at the trial the counsel from Messrs Apandi Ali will have to confine his cross-examination of the witness only to matters relevant to the 1st suit, whereas the counsel from Messrs Thangaraj will have to confine his cross-examination only to matters relevant to the 3rd suit.

In any case, the plaintiff is now estopped from raising this issue of unfairness. As has been pointed out at the earlier part of this judgment, the plaintiff, when applying for the three cases to be consolidated, although fully aware that Manzer was represented by different solicitors in the 1st suit and in the 3rd suit, yet did not thought it fit then to raise any objection to Manzer to continue having different solicitors for the two suits in the event the plaintiffs application for consolidation were to be allowed. Only later in October 2003, some four months after the plaintiff had obtained the order for consolidation (and it is pertinent to point out again that it was a consent order), that the plaintiff thought it fit to raise the present issue of representation. In my judgment, it is too late now and would not be fair to Manzer for this court to allow the plaintiff to raise the issue of representation at this stage. The plaintiff should have raised this issue of representation at the time of making the application for consolidation. Having not objected then (despite of being aware of the facts) but instead entered into a consent order with Manzer there was an implied representation by the plaintiff then that the arrangement regarding the solicitors on record for Manzer was acceptable to the plaintiff.

In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, the Federal Court explained the scope of doctrine of estoppel in the following manner:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[Application dismissed with costs.]